

The Honorable Thomas S. Zilly

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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
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BY

CV 02-02183 #000000004

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

JOEL HODGELL, an individual

Plaintiff,

v.

MEMOLINK, INC., a New York
corporation, TRIFECTA ADVERTISING,
LLC, a Colorado limited liability company,
MINDSHARE DESIGN, INC., a California
corporation, TOPICA, INC., a California
corporation

Defendants.

NO. C02-2183Z

**MOTION TO DISMISS FOR LACK
OF PERSONAL JURISDICTION
AND MEMORANDUM IN
SUPPORT THEREOF**

**NOTE ON MOTION CALENDAR:
November 29, 2002**

I. INTRODUCTION

Defendants Memolink, Inc., Trifecta Advertising, LLC, and Mindshare Design, Inc. (collectively "Defendants") herein move to dismiss this action with prejudice for lack of personal jurisdiction. Defendants have had no contacts with Plaintiff other than through the distribution of commercial e-mail via the Internet. Defendants are all out-of-state corporations, none of which have a physical presence in the state of Washington. Accordingly, Defendants have not availed themselves of this forum and haling them into Court would offend the constitutional principles of due process.

Plaintiff has previously brought identical claims in King County District Court

MOTION TO DISMISS FOR LACK OF
PERSONAL JURISDICTION
C02-2183Z - Page 1

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1 against other clients of this firm, and the claims were dismissed for lack of personal
 2 jurisdiction. The District Court awarded terms, and a judgment of \$6,925 was entered
 3 against Plaintiff. Plaintiff has not satisfied the judgment against him. Moreover,
 4 Plaintiff, along with another party, has brought these same claims against an unrelated
 5 defendant which another judge in this judicial district dismissed for lack of personal
 6 jurisdiction. Plaintiff has subsequently brought multiple actions in the Western District of
 7 Washington and Superior Court of Washington alleging the same claims against out-of-
 8 state third parties. To Defendants' knowledge, however, Plaintiff has yet to establish
 9 jurisdiction in any of the multiple claims for harms from the receipt of commercial e-mail.
 10 Plaintiff's use of the court system for e-mail claims in bad faith against out-of-state
 11 defendants has subjected Defendants, and multiple other parties, to unnecessary and
 12 unjustified expense; yet Plaintiff has been unwilling to satisfy the judgment that the courts
 13 imposed upon him.

14 This district would benefit from a published ruling regarding the discrete legal
 15 question of whether commercial e-mail alone can establish jurisdiction in a forum.
 16 Defendants respectfully request that the Court follow the authority and analysis of the
 17 Ninth Circuit and the other courts which have addressed this question and dismiss this
 18 lawsuit for lack of personal jurisdiction and award terms in favor of Defendants.

19 20 **II. FACTS**

21 **A. Procedural History**

22 In or about March 2002, Plaintiff filed a complaint against "Daniel Amato, George
 23 Amato, d/b/a Samson Distributing Inc., SDI & SDI-LABS.COM" in King County District
 24 Court (the "Prior Action"). See Townsend Decl. at ¶ 2. The Prior Action alleged that
 25 Messrs. Amato, by and through their business Samson Distributing, violated Washington
 26 statutory and common law for sending unsolicited commercial e-mail to Plaintiff.
 27 Defendants moved to dismiss the Prior Action for lack of personal jurisdiction. The state
 28 court dismissed the Prior Action and awarded terms to Mr. Amato and entered judgment

1 against Plaintiff in the amount of \$6,925. *See* Townsend Decl. at ¶ 2. That judgment has
2 been sent to collection and has not been satisfied by Plaintiff.

3 Plaintiff subsequently brought the instant action in King County Superior Court
4 alleging damages resultant from e-mails sent to Plaintiff's e-mail addresses. Defendants
5 removed the lawsuit to this Court. Defendants move to dismiss the case for lack of
6 personal jurisdiction and requests an award of fees pursuant to WASH. REV. CODE §
7 4.28.185(5) and FED. R. CIV. P. 11(c).

8 Plaintiff has had other actions dismissed for lack of personal jurisdiction under
9 substantially similar jurisdictional facts. *See* Townsend Decl. at ¶¶ 5, 6. Judge
10 Coughenour dismissed Plaintiff Hodgell's and another Plaintiff's (Konek) claims against
11 an unrelated third party. *See* Case # C02-1313C, Order of Dismissal attached to
12 Townsend Decl. Plaintiff has had at least nine other cases for harms from unsolicited
13 commercial email dismissed in Washington state courts in King County. *See* Townsend
14 Decl. at ¶ 5.

15 Defense counsel represents third party defendants in a substantially similar action
16 with substantially similar jurisdictional facts before Judge Pechman. *See* Case #C02-
17 2184P. Defense counsel has moved to dismiss that case for lack of personal jurisdiction,
18 which is noted on the same date as the instant matter.

19 B. Jurisdictional Facts¹

20 Defendant Memolink, Inc. ("Memolink") is a New York corporation with its
21 principal, and only, place of business in Colorado. *See* Asseoff Decl. at ¶ 2. Defendant
22 Trifecta Advertising, LLC ("Trifecta") is a Colorado limited liability company with its
23 principal, and only, place of business in Colorado. *Id.* at ¶ 4. Defendant Mindshare
24 Design, Inc. ("Mindshare") is a California corporation with its principal, and only, place
25 of business in California. *See* Bernard Decl. at ¶ 2. Defendants Memolink, Trifecta and
26 Mindshare are collectively referred to herein as "Defendants."

27
28 ¹This motion is limited to personal jurisdiction issues. However, Defendants would like the Court to know that their electronic mail solicitations do not give rise to a cause of action because, amongst other things, they are not false and misleading, and therefore, Defendants would prevail if the case were heard on the merits.

1 Defendant Memolink has an ownership interest in Trifecta, but the two businesses
 2 remain separate and distinct. *See* Asseoff Decl. at ¶ 3. Trifecta advertises via e-mail, but
 3 transmits e-mail advertisements through the Internet to no particular destination. In
 4 addition, neither Trifecta nor Memolink have targeted any bulk e-mail or other
 5 advertisements to the State of Washington. *See* Asseoff Decl. at ¶ 7. Additionally,
 6 neither Memolink nor Trifecta have an office, statutory agent, or telephone listing in
 7 Washington. Nor does Memolink or Trifecta have any employees, vendors, bank
 8 accounts, licenses or other operations in Washington. *See* Asseoff Decl. At ¶ 6.

9 Defendant Mindshare does not advertise via e-mail on its own, or any other
 10 party's, behalf. Mindshare is in the business of providing the infrastructure to allow its
 11 customers to send high-volume e-mails themselves. *See* Bernard Decl. at ¶ 3. Mindshare
 12 does not transmit its customers' e-mail messages itself; it just provides the technical
 13 means for its customers to do so. *See* Bernard Decl. at ¶ 4. In addition, like defendants
 14 Memolink and Trifecta, defendant Mindshare has no employees, vendors, bank accounts,
 15 licenses or operations in Washington. Furthermore, Mindshare does not have an office,
 16 statutory agent, or telephone listing in Washington. *See* Bernard Decl. At ¶ 6. As with
 17 the other defendants, Mindshare has no contact, in any way, with the State of
 18 Washington. *See* Bernard Decl. at ¶ 7.

19 The e-mail addresses to which e-mails are sent do not contain area codes or
 20 mailing addresses that would designate the location of the recipient. Moreover, e-mail
 21 can be accessed anywhere in the world via the Internet and, as a result, e-mail cannot be
 22 sent to a particular geographic location. *See* Townsend Decl. at ¶ 3.

23 Plaintiff relies on his allegations that the subject e-mail addresses are registered
 24 with <<http://registry.waisp.org>> (the "WAISP Site") as somehow establishing personal
 25 jurisdiction. The WAISP Site is a Web Site operated by "Washington Association of
 26 Internet Service Providers." The WAISP Site permits registered users to input a single e-
 27 mail address and the Site will send an e-mail message to the registered user stating
 28 whether the entered e-mail address was "found" in its database "as belonging to a

1 Washington e-mail address holder." The e-mail message sent by the WAISP Site does
 2 not indicate which e-mail in question was in its database. Therefore, the registered user
 3 must enter a single e-mail address and wait for an e-mail message from the WAISP Site
 4 regarding whether it address is included in the database. The WAISP Site does not permit
 5 bulk review of e-mail addresses. See Townsend Decl. at ¶ 9.

6 Finally, Plaintiff has not alleged a business relationship with any of the
 7 Defendants. Plaintiff has not alleged that Defendants have provided him goods or
 8 services. The only alleged relationship between Plaintiff and Defendants is that
 9 Defendants distributed e-mails over the Internet which Plaintiff fortuitously accessed
 10 while in the State of Washington.

11 12 **III. ISSUE PRESENTED**

- 13 1. Whether constitutional due process provides for jurisdiction on a defendant
 14 whose only contact with the forum arises from e-mails available and
 15 distributed over the Internet which may be accessed anywhere in the world,
 including the forum.

16 **IV. ARGUMENT AND AUTHORITY**

17 Rule 12(b)(2) of the Federal Rules of Civil Procedure provides that a Court may
 18 dismiss a motion for "lack of jurisdiction over the person." FED. R. CIV. P. 12(b)(2).
 19 The plaintiff bears the burden of proof on the necessary jurisdictional facts, such as the
 20 existence of "minimum contacts" between defendants and the forum state. See *Flynt*
 21 *Distrib. Co , Inc. v. Harvey*, 734 F.2d 1389, 1392 (9th Cir. 1984); *Farmers Ins.*
 22 *Exchange v. Portage La Prairie Mut. Ins Co.*, 907 F.2d 911, 912 (9th Cir. 1990). When
 23 defendant's motion to dismiss is made as its initial response, plaintiff only needs to make
 24 a prima facie showing that personal jurisdiction exists. See *Data Disc, Inc. v. Sys*
 25 *Technology Assoc , Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977). In this context, a "prima
 26 facie" showing means that plaintiff has produced admissible evidence which, if believed,
 27 would be sufficient to establish the existence of personal jurisdiction. See *WNS, Inc v.*
 28 *Farrow*, 884 F.2d 200, 203-04 (5th Cir. 1989).

1 The exercise of personal jurisdiction must comport with constitutional due process.
 2 Pursuant to due process, a defendant is subject to jurisdiction within a state only if it has
 3 "minimum contacts" with that state, "such that the maintenance of the suit does not
 4 offend the traditional notion of fair play and substantial justice." *International Shoe Co.*
 5 *v. Korea*, 326 U.S. 310, 316 (1945).²

6 The purpose of the "minimum contacts" requirement is to protect the defendant
 7 against the burden of litigation at a distant or inconvenient forum, and to ensure that
 8 states do not reach beyond the limits of their sovereignty imposed by their status in the
 9 federal system. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The
 10 purposeful availment requirement ensures that defendants will not be "haled into a
 11 jurisdiction through 'random,' 'fortuitous,' or 'attenuated' contacts.'" *Terracom v. Valley*
 12 *Nat'l Bank*, 49 F.3d 555, 560 (9th Cir. 1995) (quoting *Burger King Corp. v. Rudzewicz*,
 13 471 U.S. 462, 475, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985)). The central concern of the
 14 jurisdiction inquiry is the relationship between the defendant, the forum, and the
 15 litigation. *Shaffer v. Heitner*, 433 U.S. 186 (1977). To establish that the Court has *in*
 16 *personam* jurisdiction over the defendant, the plaintiff must establish general or specific
 17 jurisdiction over the defendant. *Mesalic v. Fiberfloat Corp.*, 897 F.2d 696, 699 (3rd Cir.
 18 1990). "[S]pecific jurisdiction,' is invoked when the claim is related to or arises out of
 19 the defendant's contacts with the forum." *Id.* (citation omitted). If the claim does not
 20 relate to the defendant's contacts with the forum, then the defendant must make a greater
 21 showing of contact to establish general jurisdiction.

23 1. Plaintiff Cannot Establish Specific Jurisdiction with Regard to Defendants.

24 Specific jurisdiction is satisfied only if the defendant has "purposefully directed"
 25 its activities at residents of the forum. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770,
 26

27 ²The first step in analyzing personal jurisdiction is to look at Washington's long arm statute, RCW
 28 4 28 185. In the instant matter, the Washington long arm statute does not further limit the scope of jurisdiction
 beyond the Constitution. Thus, the Washington and Constitutional analysis are identical.

1 774 (1984). Additionally, the litigation must result from injuries that “arise out of or
 2 relate to” those activities. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S.
 3 408, 414 (1984). In that respect, the Ninth Circuit uses a three-part test to determine
 4 whether a district court may exercise specific jurisdiction over a nonresident defendant:

5 “ (1) The nonresident defendant must do some act or consummate some
 6 transaction with the forum or perform some act by which he purposefully
 7 avails himself of the privilege of conducting activities in the forum, thereby
 8 invoking the benefits and protections[;] (2) the claim must be one which
 9 arises out of or results from the defendant’s forum-related activities[; and]
 10 (3) exercise of jurisdiction must be reasonable.”

11 *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995) (citations omitted).

12 (i) **Defendants did not “purposefully avail” themselves to the state of**
 13 **Washington.**

14 The “purposeful availment” requirement of part (1) is satisfied only where the
 15 plaintiff demonstrates that the defendant’s contacts with the forum state proximately
 16 create a “substantial connection” with the forum state, and where the defendant’s conduct
 17 and connection with the forum are such that he should reasonably anticipate being haled
 18 into court there. *Burger King Corp.*, 471 U.S. at 474-75.

19 Whether sending commercial electronic mail over the Internet is sufficient to
 20 establish personal jurisdiction has not been ruled upon by the Federal Courts³. Applying
 21 the Ninth Circuit’s standards and the overwhelming weight of authority addressing
 22 personal jurisdiction on the Internet supports dismissal of the instant matter. The Ninth
 23 Circuit addressed the issue of purposeful availment as applied to Internet websites in the
 24 seminal case, *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 416 (9th Cir. 1997). The
 25 *Cybersell* Court held that, in order for a website to give rise to personal jurisdiction, the
 26 website must have some presence in that jurisdiction and that it is not sufficient that it
 27 merely operates a “passive” website. In *Cybersell*, the Ninth Circuit held that registering
 28 a domain name identical to a trademark and posting a web site via such domain name on

³The Washington State Supreme Court recently ruled that Washington’s commercial electronic mail act, WASH REV CODE ch. 19 190, does not violate the Dormant Commerce Clause, but expressly did not address whether sending e-mail is sufficient to establish personal jurisdiction. *State v. Heckel*, 143 Wn 2d 824 (2001) (noting that the “jurisdictional question [is] not at issue in this case”)

1 the Internet is not sufficient to subject a party domiciled in one state to jurisdiction in
 2 another. See *Cybersell*, 130 F.3d at 418. There must be "something more" to demonstrate
 3 that the defendant purposefully directed his activity in a substantial way toward the forum
 4 state. *Id.* In *Cybersell*, defendant Cybersell, Inc. (a Florida corporation) registered the
 5 domain name <cybersell.com>. Plaintiff Cybersell, Inc. (an Arizona corporation) had
 6 submitted an application to the United States Patent and Trademark Office to register the
 7 name CYBERSELL as a service mark, and had previously operated a web site using the
 8 mark. At the time Cybersell-FL registered the domain name, Cybersell-AZ's web site had
 9 been taken down for reconstruction and the application for the service mark had not yet
 10 been approved. When Cybersell-AZ discovered defendant's web site, it filed a trademark
 11 infringement action in the District of Arizona. The Court found that defendant's use of the
 12 Cybersell name on an essentially passive web site advertisement did not constitute
 13 purposeful availment of the privilege of doing business in the state of Arizona because
 14 defendant had no contacts with Arizona other than maintaining a web page accessible to
 15 anyone over the Internet. *Id.* at 419; see also *Bensusan Restaurant Corp. v. King*, 937 F
 16 Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997) (holding that personal
 17 jurisdiction was improper as to a defendant who merely posted information on its
 18 Website).

19 The Ninth Circuit's reasoning in *Cybersell* applies in the present matter. Like the
 20 defendant in that case, Defendants' actions are distributed throughout the Internet without
 21 any purposeful direction towards any particular forum. Plaintiff's location can not be
 22 discerned from his e-mail addresses. Indeed, Plaintiff can access his e-mail accounts via
 23 any Internet-enabled device located in any city, state or country on the planet. Thus,
 24 Plaintiff's e-mail address is in no way linked to the State of Washington.

25 Propagating information through e-mail is no different than making information
 26 available through a passive Website. E-mail and Websites both distribute content to
 27 individual computers via the Internet; they simply use different transmission protocols.
 28 Internet content is distributed across the globe in the same technical fashion, regardless of

1 whether the content is transmitted as an Internet world wide web site through TCP/IP
 2 protocol, or by e-mail. From a jurisdictional standpoint, E-mail and Websites are
 3 indistinguishable. Thus, the reasoning and holding in *Cybersell* controls.

4 Plaintiff alleges that his location could be determined by inputting the e-mail
 5 address into the Internet domain, <http://registry.waisp.org/>, a Website operated by the
 6 "Washington Association of Internet Service Providers" ("WAISP"). Said Website
 7 permits registered users to input an e-mail address and WAISP will send an e-mail to the
 8 registered user indicating whether the e-mail address is registered with WAISP. This
 9 interactive process is insufficient to establish jurisdiction in Washington. The *Cybersell*
 10 court addressed that the defendant could have simply performed a trademark search to
 11 determine the potential plaintiff in Arizona, but held that due process does not require
 12 such a burden on those making information available over the Internet. Indeed, the
 13 defendant in *Cybersell* could have taken action to determine whether the visitors of its
 14 website were located in a particular place – but it did not, and therefore did not avail itself
 15 of the plaintiff's forum.

16 The Ninth Circuit has ruled that e-mail alone is insufficient to establish personal
 17 jurisdiction. In *Siskiyou Properties, LLC v. Bennett Holdings, LC*, 13 Fed. Appx. 553,
 18 2001 U.S. App. LEXIS 14429 (9th Cir. 2001), the Ninth Circuit held that "dozens [of]
 19 telephone, mail, fax and e-mail" sent to Oregon were not sufficient to establish purposeful
 20 availment in Oregon. The Ninth Circuit so held despite the fact that mail addresses
 21 clearly indicate the state to which the mail is sent without having to resort to a Website.
 22 The Ninth Circuit, citing *Burger King*, 471 U.S. 478, noted that "a contract alone does not
 23 automatically provide the required minimum contacts for the exercise of personal
 24 jurisdiction." *Siskiyou Properties*, 2001 U.S. App. LEXIS at 6-7.

25 In fact, it is well-settled in the Ninth Circuit and other circuits that phone calls,
 26 mailings and facsimile do not provide for personal jurisdiction. See *Peterson v. Kennedy*,
 27 771 F.2d 1244, 1262 (9th Cir. 1985) (telephone and mail contacts alone are insufficient to
 28 satisfy the purposeful availment test); see also *Thos. P. Gonzalez Corp v. Consejo*

1 *Nacional de Produccion de Costa Rica*, 614 F.2d 1247, 1254 (9th Cir. 1980) (“use of the
 2 mails, telephone, or other international communications simply do not qualify as
 3 purposeful activity invoking the benefits and protection of the [forum] state”). For
 4 example, in *Future Technology Today, Inc. v. OSF Healthcare Systems*, 218 F.3d 1247
 5 (11th Cir. 2000), the defendant and plaintiff engaged in regular, first-class mail, e-mail,
 6 facsimile and telephone communications and the defendant performed services for the
 7 defendant, yet the Eleventh Circuit held that the defendant had not purposefully availed
 8 itself of the Plaintiff’s jurisdiction. In *Condon v. Flying Puck, LLC.*, 35 Fed. Appx. 173,
 9 2002 U.S. App. LEXIS 9091 (6th Cir. 2002), the Sixth Circuit held that where an
 10 employee negotiated a contract with his future employer in the state of Ohio and
 11 exchanged e-mails, phone calls and faxes between California and Ohio, that the
 12 constitution mandated dismissal of plaintiff’s case in Ohio. *See also Bell Paper Box, Inc.*
 13 *v. Trans Western Polymers, Inc.*, 53 F.2d 920, 923 (8th Cir. 1995) (the use of mail or
 14 telephone from outside a state is insufficient alone to establish minimum contacts with the
 15 forum state); *T.J. Raney & Sons, Inc. v. Sec. Sav. & Loan Assoc.*, 749 F.2d 523, 525 (8th
 16 Cir. 1984) (contact by phone or mail is insufficient to justify exercise of personal
 17 jurisdiction); *Reynolds v. Int’l Amateur Athletic Fed’n*, 23 F.3d 1110, 1119 (6th Cir. 1994)
 18 (“the use of interstate facilities such as the telephone and mail is a secondary or ancillary
 19 factor and cannot alone provide the minimum contacts required by due process”).

20 The foregoing authority demonstrates that contracts, mailings, facsimiles, e-mails
 21 and telephone calls (which would include an area code) in which the defendant has a
 22 business relationship with the plaintiff is not sufficient to establish personal jurisdiction.
 23 According to the Ninth Circuit and other federal courts, Defendants would not have
 24 subjected themselves to jurisdiction by postal mailing directly to Plaintiff at his home in
 25 Washington the same advertisements to which Plaintiff objects in this case. In fact,
 26 Defendants could have actually entered into a contract with Plaintiff without being
 27 subject to Washington state jurisdiction. Therefore, sending an e-mail message over the
 28 Internet with no foreseeable destination does not purposefully avail the sender to a forum

1 in which such e-mail may be accessed, and cannot alone give rise to jurisdiction.

2 ///

3 **(ii) The Alleged Conduct by Defendants did not Arise Out of this Forum**

4 If the Court finds that Defendants did not purposely avail themselves of this forum,
5 then it does not need to reach the second and third prongs of the Ninth Circuit's specific
6 jurisdiction test. If the Court does address those prongs, it should find that plaintiff cannot
7 establish that the claim "arises out of" actions in the state of Washington and that it is
8 unreasonable to find jurisdiction in Washington.

9 To determine whether a claim arises out of forum-related activities, courts apply a
10 "but for" test. *Ziegler v. Indian River County*, 64 F.3d 470, 474 (9th Cir. 1995). The
11 Ninth Circuit has adopted a "but for" test for determining whether a plaintiff's claim
12 arises out of a defendant's forum related activities. *Doe v. American Nat'l Red Cross*, 112
13 F.3d 1048, 1051 (9th Cir. 1997). The "arising out of" requirement of the specific
14 jurisdiction test is met if "but for" the contacts between the defendant and the forum
15 state, the cause of action would not have arisen. *See Terracom*, 49 F.3d at 561. In *Shute*
16 *v. Carnival Cruise Lines*, the Ninth Circuit reasoned that:

17 the 'but for' test is consistent with the basic function of the 'arising out of'
18 requirement--it preserves the essential distinction between general and specific
19 jurisdiction. Under this test, a defendant cannot be haled into court for activities
20 unrelated to the cause of action in the absence of a showing of substantial and
21 continuous contacts sufficient to establish general jurisdiction. . . . The 'but for'
22 test preserves the requirement that there be some nexus between the cause of
23 action and the defendant's activities in the forum.

24 *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990) *rev'd on other grounds*,
25 499 U.S. 585 (1991)). Plaintiff cannot establish that "but for" the contacts between the
26 defendant and the forum state, the cause of action would not have arisen. To the contrary,
27 plaintiff's allegations assert that Defendants' actions arise from conduct in the states other
28 than Washington. Defendants created e-mail messages outside of Washington on
computers in other states (California and Colorado) and made them available globally via
the Internet. Plaintiff does not allege any relationship between itself and Defendants, in
Washington or otherwise. Even taking the allegations in the complaint as true, plaintiff

1 cannot satisfy the Ninth Circuit's "but for" requirement to find specific jurisdiction.

2
3 **(iii) It would not be reasonable to assert personal jurisdiction over**
4 **Defendants.**

5 The reasonableness prong of the Ninth Circuit test requires that the Court's
6 exercise of jurisdiction comport with "fair play and substantial justice." *Burger King*,
7 471 U.S. at 477-78. The factors that the Court must consider are:

8 (1) the extent of the defendant's purposeful interjection into the forum state,
9 (2) the burden on the defendant in defending in the forum, (3) the extent of
10 the conflict with the sovereignty of the defendant's state, (4) the forum
11 state's interest in adjudicating the dispute, (5) the most efficient judicial
12 resolution of the controversy, (6) the importance of the forum to the
13 plaintiff's interest in convenient and effective relief, and (7) the existence
14 of an alternative forum. *Id.*

15 No one factor is dispositive, and the district court must balance all seven. *Core-Vent*
16 *Corp. v. Nobel Indus., A.B.*, 11 F.3d 1482, 1488 (9th Cir. 1993).

17 The Ninth Circuit has held that "[t]he degree to which a defendant interjects
18 himself into the state affects the fairness of subjecting him to jurisdiction." *Data Disc,*
19 *Inc. v. Systems Tech. Assocs.*, 557 F.2d 1280, 1288 (9th Cir. 1977). Defendants'
20 interjections into Washington are attenuated and merely the result of the global
21 availability of the Internet, and the first factor weighs in favor of a finding of no specific
22 jurisdiction.

23 The second factor in the reasonableness test clearly weighs in favor of dismissal.
24 Defendants' burden in proceeding in this forum is substantial. The burden on three out-
25 of-state defendants to litigate this claim in Washington is significantly greater than the
26 burden facing plaintiff. Defendants' principal places of business are in California and
27 Colorado. See Asseoff Decl. at ¶¶ 2, 4; Bernard Decl. at ¶ 2. All the witnesses for
28 Defendants work and reside outside of Washington, in California or Colorado. See
Asseoff Decl. at ¶ 6; Bernard Decl. at ¶ 6. Thus, considering the various states where
Defendants' transact business, and the number of witnesses that would be required to
travel to Washington, the burden on Defendants to litigate this claim is significantly
greater than the burden on Plaintiff. Moreover, even if the burdens were equal, this factor

1 would tip in favor of the Defendants because the law of personal jurisdiction is "primarily
2 concerned with the defendant's burden." *Terracom*, 49 F.3d at 561.

3 The efficiency of the forum also weighs against a finding of reasonableness. In
4 evaluating this factor, the Ninth Circuit has looked primarily at the location of the
5 witnesses and evidence. *Core-Vent Corp. v. Nobel Indus., A.B.*, 11 F.3d 1482, 1489 (9th
6 Cir. 1993). In the present matter, the majority of the witnesses are located in various
7 other states. The Defendants' witnesses likely would be employees or agents of their
8 respective companies, located in either California or Colorado. In fact, Plaintiff has not
9 identified a single third party witness located in Washington. *See Compl.* Any evidence
10 related to damages resulting from Defendants' conduct would be located outside of
11 Washington. While litigating in these other states would no doubt inconvenience
12 plaintiff, "neither the Supreme Court nor [the Ninth Circuit] has given much weight to
13 inconvenience to the plaintiff." *Core-Vent*, 11 F.3d at 1490.

14 The burden to the Defendants in litigating in this forum is high. All Defendants
15 reside outside of Washington state. Therefore, forcing Defendants to litigate in
16 Washington, bringing witnesses and employees, would be unduly burdensome and
17 unreasonable.

18
19 **2. Defendants are not subject to general jurisdiction in Washington because they**
20 **did not have substantial, continuous or systematic activities in this state.**

21 A court may assert either general or specific jurisdiction over a defendant.
22 Plaintiff does not and cannot allege general jurisdiction in this case. General jurisdiction
23 exists when a defendant is domiciled in the forum state or when its activities there are
24 "substantial" or "continuous and systematic." *Helicopteros Nacionales de Colombia, S.A.*
25 *v. Hall*, 466 U.S. 408, 414-16, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984). The standard for
26 establishing general jurisdiction is "fairly high," *Brand v. Menlove Dodge*, 796 F.2d 1070,
27 1073 (9th Cir. 1986), and requires that the defendant's contacts be of the sort that
28 approximate physical presence. *See Gates Lear Jet Corp. v. Jensen*, 743 F.2d 1325, 1331
(9th Cir. 1984).

1 As asserted above, Defendants' alleged activities did not subject it to specific
 2 jurisdiction in Washington. Therefore, Plaintiff must establish that Defendants are
 3 subject to the general jurisdiction of courts in Washington. However, plaintiff cannot
 4 establish that any of the Defendants had "substantial" and "continuous and systematic"
 5 activities within the forum state. Such activities must be pervasive in order to establish
 6 general jurisdiction. *Data Disc Inc. v. Systems Technology Associates Inc.*, 557 F.2d
 7 1280, 1287 (9th Cir. 1977). "[P]laintiff bears the burden of demonstrating [that] contacts
 8 with the forum state [are] sufficient to give the court *in personam* jurisdiction." *Mesahic*,
 9 897 F.2d at 699.

10 Defendants simply do not have any contacts with Washington. None of
 11 Defendants' principals or employees reside in Washington. *See* Asseoff Decl. at ¶ 6;
 12 Bernard Decl. at ¶ 6. Neither do Defendants have places of business in the State of
 13 Washington. *See* Asseoff Decl. at ¶¶ 2, 4; Bernard Decl. at ¶ 2. Defendants do not have
 14 any offices or employees in Washington. *Id.* They do not own or rent real property in
 15 Washington, and they have no bank accounts in Washington. They also have no
 16 telephone listings or mailing addresses in Washington. *Id.* No principals or employees of
 17 any of Defendants are registered to vote here, and none of them are licensed to drive here.
 18 Indeed, no party related to Defendants hold any licenses from the State of Washington.
 19 *Id.*

20 **3. Defendants are Entitled to their Fees and Costs for this Motion.**

21 Defendants request that the Court require that Plaintiff pay their fees and costs for
 22 making this motion. Plaintiff has brought repeated actions against out-of-state defendants
 23 under the same jurisdictional facts and have had those actions dismissed. Plaintiff has
 24 failed to satisfy the judgment against him. Despite prior court orders, Plaintiff seeks to
 25 avail himself of the benefit of this Court. In so doing, Plaintiff has subjected Defendants
 26 to an unnecessary burden and expense where jurisdiction is not proper.

27 WASH. REV. CODE § 4.28.185 provides, in pertinent part, that

28 "(5) In the event the defendant is personally served outside the state
 [pursuant to the Washington long arm statute], and prevails in the action,

1 there may be taxed and allowed to the defendant as part of the costs of
 2 defending the action a reasonable amount to be fixed by the court as
 attorneys' fees."

3 Similarly, FED. R. CIV. P. 11 provides that the Court may order sanctions against a
 4 party for making allegations in bad faith. In this case, Plaintiff brings an action against
 5 parties on identical claims to those already dismissed with prejudice for lack of personal
 6 jurisdiction. Indeed, Plaintiff has had substantially similar actions against out-of-state
 7 defendants dismissed for lack of personal jurisdiction several times, and is therefore
 8 aware of the jurisdictional limitations the United States Constitution affords its citizens.
 9 Accordingly, this Court should award Defendants their attorneys' fees and costs incurred
 10 to defend this case and bring this motion.

11

12 V. CONCLUSION

13 Defendants have no contacts with Washington state. Therefore, Defendants
 14 respectfully request this Court dismiss with prejudice this action and Plaintiff's claims in
 15 their entirety based on lack of personal jurisdiction and award Defendants their
 16 reasonable attorneys' fees and costs.

17
 18 DATED this 7th day of November 2002.

19 Respectfully Submitted,

20 NEWMAN & NEWMAN,
 21 ATTORNEYS AT LAW, LLP

22
 23 By: *Derek A. Newman* WSBA #31794 For
 24 Derek A. Newman, WSBA No. 26967
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Attorneys for Defendants Memolink, Inc.,
 Trifecta Advertising, Inc. and Mindshare
 Design, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 7th day of November 2002, I caused the foregoing **MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND MEMORANDUM IN SUPPORT THEREOF; DECLARATION OF DANIEL AMATO IN SUPPORT OF MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION; DECLARATION OF ROGER TOWNSEND IN SUPPORT OF MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION; PROPOSED ORDER OF DISMISSAL FOR LACK OF PERSONAL JURISDICTION** to be served via the methods listed below on the following parties

VIA ABC LEGAL MESSENGER:

D Michael Tomkins, Esq
Tomkins & Associates
8420 Dayton Avenue N
Seattle, WA 98103

Dietrich Biemiller, Esq.
8420 Dayton Avenue N
Seattle, WA 98103

I declare under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct and that this declaration was executed on November 7, 2002, at Seattle, Washington

DIANA AU
Diana Au

CERTIFICATE OF SERVICE

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